

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION

4 CINDY GAMRAT,

5 Plaintiff,

DOCKET NO. 1:16-cv-1094

6 vs.

7 KEITH ALLARD, in his official
8 capacity; BENJAMIN GRAHAM, in his
9 individual capacity;
10 JOSHUA CLINE, in his individual
11 capacity; JOSEPH GAMRAT; MICHIGAN
12 HOUSE OF REPRESENTATIVES;
13 KEVIN G. COTTER, in his
14 individual capacity;
15 TIM L. BOWLIN, in his individual
16 capacity; BROCK SWARTZLE, in his
17 individual capacity; NORM SAARI,
18 in his individual capacity;
19 EDWARD MCBROOM, in his individual
20 capacity; HASSAN BEYDOUN, in his
21 individual capacity; DAVID HERR;
22 and VINCENT KRELL,

23 Defendants.

24 _____/
25 TRANSCRIPT OF MOTIONS TO DISMISS

BEFORE THE HONORABLE GORDON J. QUIST

GRAND RAPIDS, MICHIGAN

March 5, 2018

23 Court Reporter: Glenda Trexler
24 Official Court Reporter
25 United States District Court
685 Federal Building
110 Michigan Street, N.W.
Grand Rapids, Michigan 49503

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2 computer-aided transcription.

3 A P P E A R A N C E S:

4 FOR THE PLAINTIFF:

5 MR. TYLER ERNEST OSBURN
6 SCHENK, BONCHER & RYPMA
7 601 Three Mile Road, N.W.
8 Grand Rapids, Michigan 49544
9 Phone: (616) 647-8277
10 Email: tosburn@schenkboncher.com

11 FOR THE DEFENDANTS ALLARD AND GRAHAM:

12 MS. SARAH RILEY HOWARD
13 PINSKY, SMITH, FAYETTE & KENNEDY, LLP
14 146 Monroe Center Street, N.W., Suite 805
15 Grand Rapids, Michigan 49503-2824
16 Phone: (616) 451-8496
17 Email: sarahrileyhoward@hotmail.com

18 MR. H. RHETT PINSKY
19 PINSKY, SMITH, FAYETTE & KENNEDY, LLP
20 146 Monroe Center Street, N.W., Suite 805
21 Grand Rapids, Michigan 49503
22 Phone: (616) 451-8496
23 Email: hrpinsky@sbcglobal.net

24 FOR THE DEFENDANTS MICHIGAN HOUSE OF REPRESENTATIVES, MCBROOM,
25 BOWLIN, COTTER, SWARTZLE, AND BEYDOUN:

MR. GARY P. GORDON
DYKEMA GOSSETT, PLLC
Capitol View Building
201 Townsend Street, Suite 900
Lansing, Michigan 48933
Phone: (517) 374-9133
Email: ggordon@dykema.com

MR. KYLE MICHAEL ASHER
DYKEMA GOSSETT, PLLC
201 Townsend Street, Suite 900
Lansing, Michigan 48933
Phone: (517) 374-9100
Email: kasher@dykema.com

1 FOR THE DEFENDANT NORM SAARI:

2 MR. CAMERON JEZEWSKI EVANS
3 EVANS LAW GROUP, PC
4 950 West University Drive, Suite 102
5 Rochester, Michigan 48307
6 Phone: (248) 468-1485
7 Email: cevans@evanslawgrp.com

8 * * * * *

9 Grand Rapids, Michigan

10 March 5, 2018

11 2:03 p.m.

12 P R O C E E D I N G S

13 *THE COURT:* Okay. This is the case of Cindy Gamrat
14 against Keith Allard and others, docket number 1:16-cv-1094,
15 the time set for oral argument on the motions to dismiss.

16 Can I have the appearance of counsel, please.

17 *MR. OSBURN:* Tyler Osburn on behalf of plaintiff
18 Cindy Gamrat.

19 *MR. GORDON:* Gary Gordon and Kyle Asher on behalf of
20 the Michigan House of Representatives,
21 Representative Edward McBroom, Speaker of the House
22 Kevin Connor, House Business Office Director --

23 *THE COURT:* You guys can remain seated. And speak
24 into the microphone because it does help me.

25 *MR. GORDON:* -- Tim Bowlin; general counsel and chief
of staff now Court of Appeals Judge Brock Swartzle; and house
majority counsel Hassan Beydoun.

1 *THE COURT:* All right.

2 *MR. EVANS:* May it please the Court, Cameron Evans on
3 behalf of Defendant Norm Saari.

4 *MS. HOWARD:* Sarah Howard and Rhett Pinsky on behalf
5 of defendants Keith Allard and Benjamin Graham.

6 *THE COURT:* Thank you.

7 Okay. Counsel, I think I've read everything
8 submitted to me. My clerks, of course, have read into it as
9 well. And I think we're prepared to go.

10 I have some preliminary conclusions, and I'll hear
11 from -- I was going to hear from the plaintiff first, but let
12 me hear from counsel for the House of Representatives employees
13 first.

14 *MR. GORDON:* Thank you, Your Honor. This is
15 our -- well, there are multiple motions to dismiss.

16 *THE COURT:* Yes.

17 *MR. GORDON:* Our first count for dismissal is based
18 upon 12(b)(1), which is lack of jurisdiction based on the
19 court -- because of Eleventh and Tenth Amendment sovereign
20 immunity. The basis of that claim as to the House is evident.
21 As to the --

22 *THE COURT:* I have real trouble with that argument
23 that you have. I think your better arguments -- and I'm not
24 here to help you, I'm doing it so that we can keep moving --
25 would be lack of any property interest that's being affected,

1 number 1. And -- well, we'll go with number 1 first. What's
2 your argument on that? I think I understand it, and I think
3 it's a pretty good argument that there's no property interest
4 that was affected by -- that the plaintiff had that was
5 injured.

6 *MR. GORDON:* Thank you. Yeah, there's a lack of a
7 constitutional right to hold office, lack of a property
8 interest. Arguments based upon the due process and a number of
9 the other claims are based upon two factual allegations which
10 are simply one. One, that she's an employee. And two, that
11 because she's an employee of the House she has a property
12 interest and, therefore, she has a property interest, then any
13 removal from office, any of the other actions alleged to have
14 been taken against her violate the various sections in the
15 Constitution. Her due process of law argument is based solely
16 on those two standards. There's no Michigan law, case law, or
17 Sixth Circuit case law to support that position. In fact, we
18 have cited cases in our brief that indicate that holding a
19 public office is not a public right. A person holding a public
20 office is not considered an employee. She was a public
21 officer, not an employee. Therefore, she had no
22 constitutional -- and on top of that, Your Honor, Article IV,
23 Section 16 of Michigan's Constitution gives the House the sole
24 right to determine the qualifications of its members and to
25 remove its members if they believe it's warranted.

1 Additionally, she's also --

2 *THE COURT:* But then you get into the great
3 argument -- and I went back and read the Adam Clayton Powell
4 case, sort of from my era, long before you guys apparently --
5 where even -- the federal Constitution even has a stricter
6 standard, but the state Constitution says each house shall be
7 the sole judge of the qualifications, the elections, and
8 returns of its members and may with the concurrence of
9 two-thirds of all the members selected therefor and serving
10 therein expel a member. And then the argument comes, well,
11 they have certain qualifications within the same Section 16,
12 and maybe it's just limited to that. That was the case that
13 the Powell -- what's your distinction of the Powell case?

14 *MR. GORDON:* Well, Your Honor, here we have a
15 specific provision in Michigan's Constitution that doesn't set
16 forth grounds for removal. It says that each house shall be
17 the sole judge of the qualifications of its members. In fact,
18 the Michigan courts have held that their decision on that basis
19 is not reviewable. I think that's separate, and we have our
20 own standard, our own state law dealing with removal of
21 individuals.

22 Then -- so, Your Honor, before you even get to that
23 provision point, though, she still has to establish the fact
24 that she is an employee and has a property right to hold that
25 office. And that's not what the case law says in this circuit

1 or in Michigan. The courts have held that individuals holding
2 public office or public offices are not employees, they are
3 office holders, therefore, the same protections, removal with
4 due process of law, don't apply. And that's clear. And that's
5 based upon her own pleading. She has the two bases and the two
6 bases alone for that -- for the removal -- or in violation of
7 due process of law.

8 The -- I know Your Honor had indicated that the
9 sovereign immunity argument I shouldn't spend a lot of time on.

10 *THE COURT:* Yeah, don't spend a lot of time on it,
11 but you can go to legislative immunity, which is different.

12 *MR. GORDON:* Legislative immunity. Thank you,
13 Your Honor. That's based on the speech and debate clause. The
14 speech and debate clause of the United States Constitution has
15 been interpreted, Michigan courts have adopted that
16 construction because the clauses are very similar. The speech
17 and debate clause holds that anything within the legislative
18 sphere is immune from suit, immune from damages. The
19 legislative sphere doesn't only include debate on the floor of
20 Congress or debate on the floor of the House, but it involves
21 all other aspects of the legislature and operation of the
22 legislature.

23 The -- here what could be more germane, more closely
24 related to the operations of the legislature than the
25 legislature exercising its specific authority granted under

1 Article IV, Section 16? The entire process involved in that
2 encompassed the investigation by the House Business Office,
3 advice to the committees and to the House, interaction between
4 members of the House, and ultimately culminated in 91 members
5 of the House, two-thirds majority, voting that she should be
6 removed. And an aside is that that was confirmed by her
7 constituents in a subsequent run for office.

8 *THE COURT:* That's really irrelevant at this stage, I
9 think. That's an aside.

10 *MR. GORDON:* The actions under the speech or debate
11 clause talk about whether the actions are inextricably
12 intertwined with the operations of the House.

13 Let me, if I may quote, Your Honor, from Gravel
14 versus United States, which is the pretty much preeminent case
15 interpreting the speech or debate clause. States that the
16 action has to be an integral part of the deliberative and
17 communicative processes by which members participate in
18 committee and House proceedings with respect to the
19 consideration or reject of proposed legislation or with respect
20 to other matters which the Constitution places within the
21 jurisdiction of either House.

22 Clearly the Michigan Constitution has placed within
23 the House's jurisdiction the qualifications of its members.
24 Everything derives from that, and all actions taken by all of
25 the defendants here, all the House defendants that I'm

1 representing, were derivative of that constitutional provision
2 and part of the legislative process. So under the Gravel case,
3 all of these actions are clearly immune from damages and immune
4 from suit.

5 *THE COURT:* Okay. And go on to qualified immunity.
6 And then we'll hear from -- I'm going to do it by sections --
7 from Mr. Osburn, and then anyone else that wants to pipe up
8 will be able to do so.

9 *MR. GORDON:* Thank you, Your Honor.

10 Qualified immunity, of course, addresses an action --

11 *THE COURT:* Number 1 rule -- and Mr. Pinsky should
12 have told you, or Ms. Riley -- don't put it there. My first
13 day as a judge a lawyer put it there and it went --

14 *MR. GORDON:* Oh, there? Thank you, Your Honor. I'll
15 move it back. I apologize. I get dry.

16 *THE COURT:* No problem. No problem. Go ahead. It's
17 fun for me to say things like that.

18 *MR. GORDON:* Thanks, Mr. Pinsky.

19 There has to be a clearly established statutory
20 constitutional right in order to overcome qualified immunity.
21 So the statutory or constitutional right that is apparently
22 being propounded here by the plaintiff is her right to hold
23 office and not be removed from office without due process of
24 law because she's an employee and because she's an employee she
25 has a property right and, therefore, that establishes a

1 well-known, well-established statutory or constitutional right.
2 But it's just not so. Because number 1, as we've argued
3 extensively, there's no property right to hold office in the
4 state of Michigan as a member of the legislature. Number 2,
5 even if there was, the well-established constitutional or
6 statutory right usually goes to rights that are well -- against
7 self-incrimination, well-established property rights. None of
8 that has even been alleged here I don't think. So under the
9 qualified immunity standard --

10 *THE COURT:* Are you aware of any case under the
11 Fourteenth Amendment where a legislator has sued the
12 legislative body under the Fourteenth Amendment?

13 *MR. GORDON:* I am not, Your Honor.

14 *THE COURT:* I'm going to ask that question. You
15 might have an answer. And successfully I should have said.
16 Successfully sued.

17 *MR. GORDON:* No, I'm not, Your Honor.

18 *THE COURT:* Okay.

19 *MR. GORDON:* So the right is established, clearly
20 established for purposes of the qualified immunity standard
21 when it is sufficiently clear that every reasonable official
22 would have understood what he is doing violates that right.
23 And this is United States Supreme Court *Reichle versus Howards*,
24 which we've cited in our brief.

25 Here we don't approach that standard. We don't reach

1 that standard. It's not applicable because of the fact that
2 the legislator relies upon her property right as an underlying
3 basis for every subsequent action and most of the causes of
4 action in her Complaint.

5 *THE COURT:* All right. Thank you.

6 *MR. GORDON:* Thank you, Your Honor.

7 *THE COURT:* Mr. Osburn.

8 *MR. OSBURN:* Thank you, Your Honor. May it please
9 the Court.

10 *THE COURT:* Oh, Mr. Osburn -- and let me tell all
11 counsel this -- it's very helpful when you file your briefs to
12 have an index and then a table of citations, because when I
13 read his brief or your brief and then I want to see what the
14 other side says about it, there are so many of them I've got to
15 flip through there, and it takes me forever to find what we're
16 talking about. In other words, you say, "Well, that's not true
17 what he says." Well, I want to make sure I understand what he
18 says and then read. So no criticism, once again, but if we
19 could remember that, it would be very helpful from now on.

20 *MR. OSBURN:* I will do that, Your Honor. Thank you.

21 *THE COURT:* Okay.

22 *MR. OSBURN:* Your Honor just asked if there was any
23 case out there where -- forgive me if I misinterpreted what you
24 asked -- but where there was an expelled legislator who has
25 successfully sued on the basis of their expulsion. Actually

1 just this morning --

2 *THE COURT:* No, under the due process clause.

3 *MR. OSBURN:* Solely under the due process clause?

4 *THE COURT:* Under the due process clause.

5 *MR. OSBURN:* Okay. Then the case that I found does
6 not indicate that -- does not implicate the
7 Fourteenth Amendment.

8 *THE COURT:* What does it implicate, then?

9 *MR. OSBURN:* Well, in this case an expelled member of
10 the state legislature -- this is a district court case out of
11 Alabama -- but he successfully sued, and they essentially held
12 he didn't have -- he was not even accorded the barest rudiments
13 of due process. So they mentioned due process. I don't
14 believe they explicitly cite the Fourteenth Amendment in here,
15 but they do mention his right to have due process and notice of
16 the charges and fair opportunity.

17 *THE COURT:* Well, the general rule regarding -- the
18 Supreme Court really tightened up in that area recently. And
19 it used to be that you could sort of reason your way into a
20 violation, but now they say that it has to be clear to a
21 person, you know, a typical police officer. And unless you
22 have a case, as I read it, pretty much on point, you don't have
23 a claim for a violation of the Fourteenth Amendment
24 due process.

25 I got -- I had a case myself that I was affirmed on,

1 I found that there was a violation. And then, of course, it's
2 appealed because you get an interim appeal in those cases. I
3 was affirmed by the Sixth Circuit. It goes up to the
4 Supreme Court. Some new cases came out, they reversed the
5 Sixth Circuit, reversed me, because the wrong standard. That
6 was a standard that was applicable maybe four years ago, but
7 now the standard is really tough. You've got to pretty well
8 find a case directly on point. So what is your best case?

9 *MR. OSBURN:* Forgive me, Your Honor, are you speaking
10 with regard to qualified immunity or --

11 *THE COURT:* No -- yes, with qualified immunity. I
12 guess I jumped -- jumped over a little bit. Yeah. Qualified
13 immunity.

14 *MR. OSBURN:* Well, I think it's important for
15 qualified immunity -- the best case that -- I've cited the
16 seminal case Harlow versus Fitzgerald and then Mullins versus
17 Cyranek which was a Sixth Circuit case. And that says whether
18 the facts -- Your Honor knows what that says -- whether the
19 right violated was clearly established. But the right violated
20 here is not just the constitutional right to procedural
21 due process. We've pled conspiracy. We've pled --

22 *THE COURT:* Well, I'm talking just about Count 1
23 right now.

24 *MR. OSBURN:* As far as the procedural due process?

25 *THE COURT:* Yeah.

1 *MR. OSBURN:* Those are the cases -- I couldn't find a
2 Sixth Circuit case on point, Your Honor. This is a unique
3 case, and I think that that -- in the history of the Michigan
4 legislature, there have been four members that have actually
5 been expelled. So this is not a case that -- where it comes up
6 a lot in any circuit, let alone the Sixth Circuit. So, no, I
7 did not find a case directly on point as to that point,
8 Your Honor.

9 *THE COURT:* Okay.

10 *MR. OSBURN:* But as far as -- as far as the rest of
11 the counts with qualified immunity, I mean, it's clear that my
12 client had a right not to be stalked, not to be wiretapped, not
13 to be extorted. I don't think that they can argue with a
14 straight face that she did not have those rights and that they
15 didn't know she had those rights.

16 *THE COURT:* All right. Thank you.

17 *MR. OSBURN:* Now, with regard to the procedural due
18 process rights, again, because of the uniqueness of this case
19 and the fact that it just doesn't happen when you expel a
20 member of the legislature, the cases -- the seminal
21 Sixth Circuit case, *Burks versus Perk*, involved a committee
22 that served and they could be removed for cause by the mayor.
23 They were not duly elected members of Congress.

24 My client at all times during this whole -- during
25 the whole nine months of her time in office met all of the

1 qualifications to be a House of Representatives member. And,
2 yes, the House has the sole right to judge the qualifications
3 of its members, and she met those qualifications.

4 *THE COURT:* You're saying the qualifications then are
5 limited, like Adam Clayton Powell said many years ago, to the
6 age, citizenship, and residence?

7 *MR. OSBURN:* Well, yeah, in the Michigan Constitution
8 it's at least 21 years of age, an elector of the district you
9 represent, a citizen, and have not been convicted of subversion
10 or a felony involving a breach of the public trust.

11 At all times she met the qualifications. And even in
12 the Powell case, which does involve an exclusion as opposed to
13 an expulsion -- so I know there is that distinction out there
14 that has to be addressed -- but with regard to expulsion the
15 court did state that a member whose expulsion is contemplated
16 may as a matter of right address the House and participate
17 fully in debate. And that just didn't happen in this case.
18 That didn't happen in this case. And I think that's important
19 because what defendants, I think, would like this Court to do
20 is to put all of the other claims of stalking and wiretapping
21 and conspiracy, put all of those claims in one bucket and then
22 put the procedural due process violation in another bucket.
23 And I don't think you can do that in this case. Because what
24 we've shown, what the evidence has shown, is that during this
25 period of time the House defendants had meetings, had a lot of

1 meetings with the staff defendants, Allard, Graham, and Cline.
2 And during this time the staff defendants -- Allard, Graham,
3 and Cline -- had over 200 communications with Defendant Gamrat
4 and Defendant Horr who were the extortionists in this case as
5 per the Michigan State Police report.

6 You have staff defendants representing that they work
7 for the speaker, that they know the office is bugged. The
8 extortionist representing that he had a meeting with the
9 speaker. We have attached evidence to show this nexus between
10 the defendants. And now this formed the foundation, formed the
11 basis of her ultimate expulsion. So I don't see how you can
12 separate it the way the defendants want to separate it.
13 Because the only reason that she was expelled is because of all
14 these activities that were going on. All these illegal and
15 tortious activities that were going on throughout the time --
16 throughout her time as a state representative. And I think
17 that's what distinguishes this case, is that you just can't
18 make that distinction, because that, again, formed the
19 foundation.

20 And then any evidence that we might have of
21 communications, as per my supplemental brief or my motion for
22 leave and supplemental brief attached, a lot of it has been
23 destroyed. Now, there are two computers that were seized by
24 the House that we might still be able to get information off
25 of, but part of the information destroyed was a messaging

1 system between legislators and their staff. So we don't know
2 any of the content of those messages. But the evidence
3 destroyed went directly to the content of the meetings between
4 the staff defendants and the House defendants.

5 The only thing we have to show at this point to
6 survive a (b)(6) motion is that our claims are plausible. And
7 the evidence that we've submitted to show the nexus between the
8 defendants and as it relates to her ultimate expulsion clearly
9 nudges those claims to plausible.

10 Now, as far as legislative immunity goes, I know
11 Your Honor brought that up, the purpose of legislative immunity
12 is to preserve the integrity of the legislative process and
13 independence of legislators.

14 Now, to extend the legislative sphere -- and this is
15 why I think it's important that you can't separate this into
16 two buckets like defendants have tried to do -- the scope of
17 the legislative sphere to encompass now the activities that
18 happened that led up and directly caused my client's ultimate
19 expulsion, those being the tortious activities described in the
20 Amended Complaint, I don't see how you can make an argument
21 that they should be afforded legislative immunity for those
22 actions taken. And, again, those actions directly led to her
23 expulsion. I think to extend the legislative sphere that far
24 is simply not warranted.

25 And then in the case of Haskell versus

1 Washington Township, which is a Sixth Circuit case, it
2 specified that a legislative action that singles out
3 specifiable individuals and affects them differently should be
4 considered administrative rather than legislative anyway. But,
5 again, even if it is a legislative action, to extend that
6 sphere to include the totality of what happened in this case is
7 way too broad. And the courts have recognized that that sphere
8 is not unlimited.

9 *THE COURT:* Well, the question is, I think -- this is
10 a quote from Eastland -- "An integral part of the deliberative
11 and communicative processes by which members participate in
12 Committee and House proceedings with respect to the
13 consideration and passage of or rejection of proposed
14 legislation or with respect to other matters which the
15 Constitution places within the jurisdiction of either house."
16 That's the kind of activity that is covered by the legislative
17 immunity.

18 In other words, it's more than just getting on the
19 floor and arguing. It's discussions regarding other proposed
20 legislation. And the other thing is the actions of the House
21 itself.

22 One of the problems I have -- and it's not briefed or
23 anything -- but that I have, and it's mentioned in the Powell
24 case, and that is how much should courts get involved in
25 telling state legislatures or the United States Congress how to

1 run their business? It's a very difficult thing. And, you
2 know, the court keeps creeping into what you might call
3 legislative matters, and the legislature tries to creep
4 sometimes into what the court does. So I'm a hesitant judge
5 here, I think. But anyway. That's me.

6 *MR. OSBURN:* Sure. I appreciate that, Your Honor.
7 But the case law does say that that absolute immunity does not
8 extend even to traditionally legislative actions taken in bad
9 faith because of corruption or primarily in furtherance of
10 personal interest.

11 We've pled the bad faith and the corruption as it
12 pertains to this whole legislative process that they are trying
13 to be -- that they are trying to have covered by this
14 legislative immunity.

15 *THE COURT:* All right. Okay. I think you've
16 addressed qualified immunity and legislative immunity.

17 *MR. OSBURN:* Yes, Your Honor. And I have addressed
18 procedural due process as well. There is a -- yes, they
19 have -- the House has the sole -- the sole authority to judge
20 the qualifications of its members, but it has to do so in a
21 fair and just manner, and that's in the Constitution as well.

22 *THE COURT:* Okay.

23 *MR. OSBURN:* And that's part of what we've pled in
24 our Amended Complaint is that they have not comported with that
25 responsibility or their responsibility under the

1 Fourteenth Amendment.

2 *THE COURT:* All right. Thank you.

3 *MR. OSBURN:* Thank you, Your Honor.

4 *THE COURT:* Yep. Anybody else want to jump in on
5 this?

6 *MS. HOWARD:* We'd like to address the arguments in
7 our motion.

8 *THE COURT:* Just those issues, legislative immunity?

9 *MS. HOWARD:* No, nothing on that issue.

10 *THE COURT:* All right. Anything more from one of the
11 defendants?

12 *MR. EVANS:* Not on behalf of Defendant Saari.

13 *MR. GORDON:* If I may, Your Honor, one small point.
14 Again, going back to the employee issue, is that she claims
15 that -- the plaintiff claims that her removal by the House was
16 in violation of her due process rights because she's an
17 employee. Employees' due process rights under the *Loudermill*
18 case -- and I don't have the full cite -- are simply that the
19 employee is offered an opportunity to be advised of the charges
20 and to respond if necessary. It's not a hearing right. It's
21 not a grievance or an arbitration. It's here is a charge. Did
22 you do it or not?

23 She was fully aware of the charges brought against
24 her. She had an opportunity to address those before the
25 committee. And I don't know if she attempted to do so before

1 the House, but there certainly are procedural rules of the
2 House that allow members to speak. So even if she were an
3 employee, there's no due process right because she was afforded
4 due process rights that are given to employees.

5 *THE COURT:* All right. Don't go anywhere. Jump to
6 the communications act, the federal Telecommunications Act and
7 the state Communications Act, and the eavesdropping statute.

8 *MR. GORDON:* Thank you, Your Honor. As to those
9 acts, there's really nothing implicating any of my clients
10 other than speculation. And gross speculation that perhaps
11 there were wiretaps. And -- but -- I'm sorry -- but none of my
12 clients participated in any wiretapping -- that's admitted in
13 the Complaint -- under either the Michigan or the federal act.
14 None of my clients ordered anybody to engage in any
15 wiretapping. There is speculation and conjecture in the
16 Complaint that is "on information and belief I think that maybe
17 some of the House defendants ordered the other defendants to
18 engage in wiretapping." But there's no concrete allegation to
19 that effect.

20 *THE COURT:* Well --

21 *MR. GORDON:* I'm sorry, Your Honor.

22 *THE COURT:* Wiretapping, of course, is secretive by
23 nature, and the argument probably would be that, you know,
24 "Well, give us a little chance here, give us a little time, let
25 us take a few depositions to find out." It's like conspiracy

1 law. There's a conspiracy which is by definition almost, you
2 know, secret.

3 *MR. GORDON:* Your Honor, you hit the nail on the
4 head, if I may.

5 *THE COURT:* Okay.

6 *MR. GORDON:* This is akin to a conspiracy allegation.
7 And the Sixth Circuit has recognized that with regard to
8 allegations of conspiracy, and I quote, "It is well settled
9 that conspiracy claims must be pled with some degree of
10 specificity and that vague and conclusory allegations
11 unsupported by material facts will not be sufficient to state
12 such a claim under federal law." That's the Spadafore versus
13 Gardner case that we cited in our brief.

14 Here this falls on all fours with that quote. There
15 are no specific facts. There is nothing to tie any of my
16 clients with the alleged wiretapping. In fact, they
17 specifically and vehemently deny there was any involvement
18 there. But without regard to the existence or nonexistence of
19 wiretapping by other people, the plaintiff has not met the
20 standard of pleading that's necessary to state a cause of
21 action. It's all based on speculation and information and
22 belief. Every single count or paragraph that references any of
23 my clients makes that statement.

24 *THE COURT:* Okay.

25 *MR. GORDON:* So he's guessing, and he says, "Yeah,

1 well, you know, give me a chance to do discovery and maybe I'll
2 be able to come up with pleadings adequate to support a cause
3 of action." That's not what the federal rules require. That's
4 not what the Sixth Circuit requires. And he hasn't met that
5 standard.

6 *THE COURT:* Okay. Thank you.

7 Mr. Osborn. Osburn, I mean. I'm sorry, sir.

8 *MR. OSBURN:* I'm sorry, Your Honor, I didn't catch
9 the last thing you said.

10 *THE COURT:* I said "Osborn" and I meant to say
11 "Osburn." Sorry.

12 *MR. OSBURN:* No, that's all right. You know, we've
13 pled with regard to the conspiracy, with regard to the
14 wiretapping these meetings that were occurring. And they were
15 occurring. The defendants have admitted they were occurring
16 between the staff defendants and the House defendants.

17 Now, the content of those meetings, we would love to
18 conduct discovery on those. Frankly, because of the
19 information that we've uncovered since we've filed the Amended
20 Complaint, that might not even get us to where we need to go
21 because that information has been destroyed by House defendants
22 in either a grossly negligent or an intentional manner,
23 according to our expert.

24 So, yes -- and, Your Honor, it is secretive by
25 nature, and that's why we pled it upon information and belief.

1 But we pled that the times of these specific meetings with --
2 between House defendants and staff defendants. Again, there
3 are those extensive communications documented in the State
4 Police report between staff defendants Defendant Joe Gamrat and
5 Defendant Horr. And, again, all the representations about "I
6 work for the speaker, I work for the speaker." We have this
7 nexus here. And, again, that's what we've plead. These aren't
8 vague and conclusory allegations.

9 Now, again, the content of those meetings, yeah, we
10 don't know what was said, and we won't know until we take a
11 deposition or two or until we're able to look at these other
12 two computers that have been locked by House defendants.

13 *THE COURT:* So one of the reasons, though, for
14 qualified immunity is so that defendants don't have to go
15 through this kind of discovery before, you know, you get a
16 decision.

17 *MR. OSBURN:* I understand that, Your Honor. But,
18 again, they knew when they were taking these actions -- I mean,
19 even if you just look at the destruction of evidence. They
20 know that it's wrong to tamper with evidence. I mean, if
21 that's -- if that's the standard here where they can just
22 destroy evidence as to these meetings that occurred or as to
23 anything in particular, yeah, any time you bring a claim
24 against a governmental actor or a governmental agency you're
25 not going to get very far.

1 So I would argue that their argument in that regard
2 that we have not met the standard of the pleading fails because
3 we have pled these meetings, we've pled the communications,
4 we've shown whatever communications we've been privy to at this
5 time. We know there are more communications because of the
6 State Police interviews with House defendants, with staff
7 defendants that we have not been privy to, that we have not
8 been able to uncover. So that's what we're -- you know, that's
9 what we're really talking about here. But, yes, it is by
10 nature secretive, but that's why we're trying to get to the
11 bottom of it.

12 *THE COURT:* Yeah. But there are countervailing
13 arguments as well, I think, that were articulated.

14 Okay. Thank you, sir.

15 Do you want to finish up? Then I'll give you a
16 chance.

17 *MR. GORDON:* Yeah. A couple things, Your Honor. I
18 object to the continuing reference to destroyed evidence. You
19 have granted the motion to file a supplemental brief. The
20 supplemental brief has not been filed. There has not been an
21 opportunity to respond. And that contains some wild
22 allegations of destruction of evidence which has not been
23 proved.

24 You have a couple of affidavits attached to that of
25 so-called computer experts, but other computer experts will say

1 that some of the so-called hits or information contained in
2 their affidavits is caused by an investigator booting up the
3 computer to download evidence and information. So that's
4 offensive. It's not in the record. And I think it's
5 inappropriate to speak to destroyed evidence. That slanders my
6 clients.

7 Now back to the issue you addressed. There's one
8 other case cite I'd like to bring to your attention, and that's
9 on page 34 of our main brief, and it specifically dealt with a
10 Third Circuit dismissal of a wiretapping complaint. And I
11 quote -- the case is In re: Nickelodeon Consumer Privacy
12 Litigation, and I quote --

13 *THE COURT:* What's the cite? What's the cite on it?
14 Never mind, I've got it here.

15 *MR. GORDON:* Thank you, Your Honor.

16 It says, "The plaintiff's allegations of procurement
17 in this case are entirely conclusory and, therefore, fail to
18 comport with the Supreme Court's teaching that all aspects of a
19 Complaint must rest on well-pleaded factual allegations and not
20 merely conclusory statements." As to my clients all we have
21 are conclusory statements. "On information and belief" is how
22 every single paragraph starts. But if you read the paragraph,
23 there's no information, all there is is belief and conclusory
24 statements. Thank you, Your Honor.

25 *THE COURT:* Thank you.

1 Is it Mr. Evans?

2 **MR. EVANS:** Thank you, Your Honor. On behalf of
3 Defendant Norm Saari, I just have a few points I want to raise.
4 And I think it's important to remember that as chief of staff
5 for then Speaker of the House Cotter, Mr. Saari exited stage
6 right as of August 2nd when he was appointed to the Public
7 Service Commission.

8 With that said, the U.S. Supreme Court in Iqbal says
9 "Plausibility asks for more than a sheer possibility that a
10 defendant acted unlawfully." And what we have here is a
11 situation of a sheer possibility, which is insufficient to
12 plead a claim under 12(b)(6).

13 There's been some mention about the secretive nature
14 of a conspiracy. But we have a different procedural posture in
15 this case where there was a curtain dropped to keep people out
16 from seeing what was going on. The curtain has been lifted to
17 a certain extent already.

18 You have an extensive House Business Office
19 investigation. You have over an 800-page report from the House
20 Business Office that is public attached to plaintiff's
21 Complaint. At least portions of it. You had open hearings in
22 the Michigan House over the charges and the debate and the
23 ultimate votes. We have police reports from the
24 Michigan State Police that have been made public. We've had
25 people put under oath in open court in connection with criminal

1 charges that have been brought.

2 And so this thing of let's take a few depositions,
3 plaintiff has far more information than a typical plaintiff may
4 have to understand what is going on. And what we're left with
5 as it relates to Defendant Saari is paragraph 46 in the
6 First Amended Complaint. It says, "Upon information and belief
7 it was around this time that Cotter, Saari, and Swartzle began
8 meeting with Allard, Graham, and Cline in order to direct them
9 to gather information against Gamrat." Gather information
10 about Gamrat. There's no allegation here that they told them
11 to go and illegally wiretap. There's no allegation they told
12 them -- that Mr. Saari told them to do anything illegal. And
13 the simple allegation in connection with people who are
14 employees of the House complaining to a supervisor of improper
15 work conduct cannot be lost in this day and age of harassment
16 complaints that workforces and employers face.

17 Mr. Saari, as the chief of staff, if this were a
18 harassment complaint, what, now he is prohibited from having an
19 investigation done? Because if you do an investigation you're
20 going to be sued for civil conspiracy, stalking, wiretapping,
21 eavesdropping? If you don't do an investigation, you're
22 dropping the ball on your responsibilities of being management
23 and an employer for looking into serious legitimate concerns.

24 I think Exhibit -- paragraph 46 and also
25 paragraph 190, 1-9-0 in the First Amended Complaint, again it's

1 upon information and belief to conduct surveillance or to
2 gather information. There's nothing in those allegations that
3 are sufficient to say that it's anything more than a sheer
4 possibility that Mr. Saari directed them to do anything
5 illegal.

6 And if you look at the House business report,
7 Mr. Saari is interviewed and he does not have any, any
8 information that was allegedly obtained by wrongful wiretaps or
9 eavesdrops -- or eavesdropping from Allard, Graham, and Cline.
10 So as it relates to Defendant Saari, there's some additional
11 reasons that we believe that that claim should be dismissed as
12 to him on a 12(b)(6) motion.

13 *THE COURT:* Okay. Thank you, sir.

14 Mrs. Howard.

15 *MS. HOWARD:* Yes, Your Honor.

16 *THE COURT:* Formerly known as Ms. Riley, I believe.

17 *MS. HOWARD:* Your Honor, I represent Keith Allard and
18 Ben Graham who are before this Court in a separate case
19 involving these events, as Your Honor is aware.

20 *THE COURT:* Well, before the Court, that gives it a
21 whole new meaning. I don't think they were ever here.

22 *MS. HOWARD:* That's true, Your Honor. Before the
23 Court in the legal sense, I guess.

24 *THE COURT:* Yes.

25 *MS. HOWARD:* To simply address the wiretapping and

1 the eavesdropping count, which is Count 5, with respect to my
2 clients Allard and Graham. There is nothing in the Complaint
3 which supports such a claim on -- as to my clients.

4 I would address -- I'm going to start backwards, I
5 think, because it makes the most sense. With respect to the
6 issue raised by plaintiff in the supplemental brief about the
7 alleged spoliation of evidence. I have no idea whether or not
8 that allegation is true or not, but it has nothing to do with
9 my clients who were terminated from the House, not in a
10 position to effect anything related to spoliation of evidence.
11 The plaintiff has not alleged that they were. There would be
12 no way to allege that they were. And so to the extent that any
13 spoliation took place or did not take place, that issue has
14 zero relevance to my clients and whether or not they are
15 entitled to dismissal with prejudice of the claims today or
16 not. They had no control over it. They can't possibly be held
17 responsible for it. And nobody has alleged that they had any
18 control over it, Your Honor. Now, with respect to -- and that
19 would apply to all the claims.

20 With respect to the wiretapping and eavesdropping
21 claims, the Complaint -- to the extent that there are specific
22 allegations and not mere conclusory allegations, the Complaint
23 references outside sources. The response brief talks about
24 various allegations and things that are in those reports. But
25 even if the Court were to permit amendment of the Complaint,

1 that would be futile because there's nothing that's cited that
2 provides direct evidence which would support this claim.

3 The plaintiff talks about the text messages with
4 Joe Gamrat, but there's no indication there that -- to support
5 a claim that either of my clients violated federal
6 wiretapping/eavesdropping statutes or state statutes.

7 The references -- another one of the references to
8 the State Police report talks about text messages, but it
9 contains only records of text messages being sent, not what was
10 in them. So there's nothing there to support that there was
11 illegal wiretapping, eavesdropping going on.

12 There was a reference to the House Business Office
13 report where staffer Ann Hill says she wonders if my client is
14 engaged in surveillance. That's not enough under the Iqbal
15 standard to constitute a sufficient allegation to support the
16 claim.

17 There is a reference on page 10 of plaintiff's
18 response brief at page ID 703 where the plaintiff talks about
19 potentially Ben Graham wiretapping a phone call between Courser
20 and Gamrat. The only thing I can think of that she's talking
21 about there is when my client lawfully recorded the
22 conversation he had with Todd Courser the night in May when
23 Mr. Courser asked Mr. Graham to send the infamous controlled
24 burn email. And Mr. Courser called Cindy Gamrat on the phone
25 and talked to her while he was talking to Ben Graham and the

1 recording picks up some parts of that conversation from the
2 side that Mr. Graham can hear. But there's nothing illegal
3 about that because he was a party to the conversation with
4 Mr. Courser. And I'm not even sure that's the telephone call
5 that they are talking about, but that's the only one I can
6 think of. And, again, that's only mentioned in the response
7 brief. I can't find anywhere where that's alleged in the
8 Complaint. So, again, not enough to support an illegal
9 wiretapping or eavesdropping claim.

10 And then it's simply not plausible, the conclusion,
11 such that it is alleged, that is being asked to be drawn in the
12 Complaint. Which was that Allard and Graham were working with
13 the House defendants. Everything -- a lot which is cited is
14 cited directly back to my client's separate Complaint alleging
15 they were fired in violation of the First Amendment, alleging
16 they were retaliated against, alleging they were fired in
17 violation of the Whistleblower's Protection Act. So to infer
18 and cite that Complaint and say they were obviously working
19 together simply doesn't make logical sense since that Complaint
20 alleged the very opposite of they were working together.

21 But as Mr. Evans points out, they certainly were
22 allowed to meet, which they did, to go and report to House
23 leadership that they felt there were untoward, illegal,
24 unethical things going on in the office, which is what
25 happened. All they have alleged is that there were meetings

1 taking place, which no one disputes there were meetings taking
2 place. But it's a big jump to say what they must have been
3 discussing was illegal surveillance, that they had done illegal
4 surveillance, that they had done illegal wiretapping, and
5 there's simply nothing to provide factual basis in the
6 allegations in the Complaint or otherwise, frankly, to support
7 that conclusion.

8 It is a long way to say that they were meeting than
9 to argue that the House leadership directed them and that they
10 directed them to do something illegal. There's just simply no
11 factual support in this Complaint or in any other document
12 we've been pointed to to go chase after these allegations to
13 support that. And as a result, Your Honor, the Count V must be
14 dismissed with prejudice against my clients.

15 *THE COURT:* Thank you.

16 *MS. HOWARD:* Thank you.

17 *THE COURT:* Anybody else? Mr. Osburn, do you want to
18 say anything in reply, rebuttal?

19 *MR. OSBURN:* If I just may, a couple things,
20 Your Honor. As to Defendant Saari, we're absolutely not saying
21 that an investigation can't be done. We are saying that it has
22 to comport with the law. And that's the issue in this case.
23 And to the extent that he relies upon the HBO report and even
24 his client's statements in the HBO report, that report was
25 based on the unsworn testimony, unsworn statements. There was

1 no testimony in that -- in the HBO report. My client was not
2 allowed to call witnesses. My client was not informed of the
3 charges against her. My client was not allowed to test any of
4 the claims that were being levied against her. And if she had
5 been, as we later found out, because charges were brought
6 against my client, my client was brought up on charges related
7 directly to the contents of that HBO report. And as soon as
8 she had a chance, through her counsel at the time, to conduct
9 an evidentiary hearing, to confront the witnesses against her,
10 to take a look at some of the evidence, it was thrown out --
11 the charges were thrown out. The charge of misconduct in
12 office were thrown out at the probable cause hearing. So
13 whatever reliance they may have on this HBO report as it
14 pertains to misconduct of my client is misplaced because it has
15 no credibility in that regard.

16 As to Defendants Allard and Graham stating that the
17 contents of our supplemental brief and the information
18 regarding the spoliation doesn't affect her clients I think is
19 a little bit too broad because it does affect the
20 communications that her clients may have had with House
21 defendants. We're not claiming that they spoliated the
22 evidence, but I think it does affect our claims as they pertain
23 to her clients.

24 And not only that, in the state police interviews
25 Defendant Beydoun referenced multiple recordings made by

1 Ben Graham. We have not been privy to any of those recordings.
2 And we've presented the evidence that during this time -- well,
3 my client is -- this isn't in dispute, my client was being
4 extorted during this time. We have extensive communications
5 between Defendants Allard and Graham and the extortionist
6 defendants. And not only that, Defendant Allard and Graham
7 both --

8 *THE COURT:* What -- define for me better the
9 extortion, if you would, please. The word "extortion."

10 *MR. OSBURN:* Sure. During this time my client
11 started receiving -- her and Representative Courser started
12 receiving text messages from an unknown person essentially
13 trying to blackmail her into -- and Representative Courser into
14 quitting and to informing their spouses about the affair,
15 threatening to reveal compromising recordings and information
16 regarding the affair. And eventually it came out that that
17 person was believed to either be Representative Gamrat's
18 husband, ex-husband, and Defendant Horr. And, again, between
19 those two people and staff defendants Allard and Graham and
20 Cline we have over 200 communications during this time. Of
21 which we don't have all of them, but we know they exist because
22 they are referenced in the State Police report, so . . .

23 *THE COURT:* Then how do you link that to particular
24 defendants in this case?

25 *MR. OSBURN:* Because at that point -- what do you

1 mean particular defendants, Your Honor? Which defendants?

2 *THE COURT:* Any of them.

3 *MR. OSBURN:* Because at that point these
4 extortionists referenced these recordings that they had,
5 these -- everything that they had pertaining to my client's --
6 the affair that my client was engaged in at the time.

7 Again, during that time my --

8 *THE COURT:* Based on --

9 *MR. OSBURN:* Yes.

10 *THE COURT:* -- what you have said and what
11 Mrs. Howard has said, you're saying that someone was trying to
12 extort your client with disclosing information about her
13 apparently and, therefore, I get to sue these defendants?

14 *MR. OSBURN:* Because during that time my client's --
15 or I'm sorry -- the extortionist defendants were in constant
16 communication with staff defendants. And we have information
17 that staff defendants were even sending pictures of my client's
18 vehicle at various locations to these extortionist defendants.
19 That's the basis of the claim, Your Honor. So I think that's
20 important to remember.

21 *THE COURT:* Okay. Thank you.

22 *MR. OSBURN:* Thank you.

23 *THE COURT:* Well, as I -- let me refer to my notes
24 here. We've hit on the two federal claims, and now we're
25 starting, I think, talking about state law: Breach of

1 contract, promissory estoppel, malicious prosecution, abuse of
2 process, civil stalking, civil conspiracy, defamation. I think
3 that's going to be dismissed, correct, Mr. Osburn?

4 *MR. OSBURN:* Correct, Your Honor.

5 *THE COURT:* And I'll pick up the other dismissals
6 later. And then fraud. So we've hit A, B, F.

7 All right. Let's hear from the House of
8 Representatives, then, on the breach of contract, promissory
9 estoppel. Unless you want someone else to go forward.

10 *MR. GORDON:* I can go forward first, Your Honor. I
11 never turn down a chance to speak.

12 *THE COURT:* All right.

13 *MR. GORDON:* For the breach of contract, promissory
14 estoppel charges, it's important to remember that at all times
15 encompassed by the allegations in the Complaint addressing
16 these two issues, which are pretty much intertwined, the
17 plaintiff was represented by outside counsel. She was not
18 there alone and being taken advantage of by anybody.

19 Now, the breach of contract claim appears to be based
20 on an agreement to issue a joint statement to the
21 House Committee with regard to her actions and so on. And
22 that's the contract I believe they are alleging is in existence
23 and was breached by she claims --

24 *THE COURT:* Tell me that again because I didn't
25 understand.

1 Did you hear him, Mr. Osburn?

2 MR. OSBURN: Yes.

3 THE COURT: All right. Is what he is saying correct
4 as to the contract you're talking about?

5 MR. OSBURN: Essentially, Your Honor. There's also
6 the oral representations made by --

7 THE COURT: That's what I was focusing in on when he
8 was saying that. Okay.

9 MR. GORDON: So as far as a written document, it was
10 never signed by both parties. And it ended up being in essence
11 a plea by the plaintiff for mercy for censure instead of
12 expulsion. So the requirements for there to be a contract are
13 not met.

14 Now, she claims that there was some oral statement
15 that the House defendants could guarantee a vote in support of
16 censure. Now, the House defendants that she's speaking to here
17 are the Cotter, Bowlin, Swartzle, McBroom, and Beydoun. Now,
18 they are all named, but there aren't any real allegations as to
19 Mr. Bowlin. And Mr. -- Representative McBroom was head of the
20 Senate subcommittee.

21 Now, they are claiming that, "Well, this was a
22 promise, and it was a promise upon which we could rely because,
23 for example, Mr. Beydoun was house majority counsel, and house
24 majority counsel is the counsel for all the Republicans. And
25 all the Republicans meet in caucus. And all the Republicans in

1 the caucus signed some kind of agreement that they would all
2 vote together on substantive issues." But as we've delineated
3 in our reply brief, that doesn't happen. One member of the
4 staff -- or the underlying assumption that anybody can
5 guarantee that individual members of a deliberative body are
6 going to collectively vote in one way or another is simply
7 nonsense. Nobody can reasonably rely on that.

8 The case law in Michigan is that -- and I quote --
9 "Public officers have and can exercise only such powers as are
10 conferred on them by law, and that all persons dealing with
11 such officers are charged with knowledge of the extent of their
12 authority or power to bind the state and are bound at their
13 peril to ascertain whether the contemplated contract is within
14 the power conferred." That's the Sittler versus Board of
15 Control of Michigan College of Mining and Technology which is
16 cited in our brief.

17 How one could assume that any one of these
18 individuals had the authority, had the power to bind the House,
19 especially when the person making that assumption is a member
20 of the House who has demonstrated a fiercely independent voting
21 track contrary many times to that of the caucus, to rely on
22 that is not reasonable. There has to be reasonable reliance
23 upon the oral statements. And the person who is relying on
24 those statements is charged with the responsibility of
25 determining whether such reliance is reasonable. She cannot

1 make that statement here.

2 *THE COURT:* Okay. Thank you.

3 *MR. GORDON:* Thank you, Your Honor.

4 *THE COURT:* Mr. Osburn. I think you've got a real
5 problem on this, Mr. Osburn. Her expulsion required the vote
6 of the entire House, and to say that anyone had any authority
7 to make any promises to her is beyond comprehension in my mind.

8 *MR. OSBURN:* Well, Your Honor, what was not
9 mentioned, or maybe it was briefly mentioned, is the caucus
10 pledge that my client signed. Now, it is true that --

11 *THE COURT:* I don't care about that. These people
12 that go in there, they vote on -- they might have rules that
13 they want to abide by or someone wants to get them to abide by,
14 apparently some of these people are leaders in the house and
15 they want to get everybody to agree on that, and maybe they do,
16 but when it comes to a legislative body, these people go all
17 over the place, in a situation especially like this I would
18 think. And to say that -- you've got to look at it just beyond
19 your case. To say that, well, the chief counsel or the speaker
20 or the chief guy in charge of the staff or this state of
21 Michigan has promised me this and then you start investing in
22 it, for example, or any other promise that he might make,
23 everybody knows that it has to be decided by the legislature.
24 That guy can't promise anything. Anything. And you're saying,
25 well, he was -- he had so much power that he could tell these

1 people how to vote and they would have to do it. That it's
2 legally binding. I've never heard such an argument.

3 *MR. OSBURN:* Well, first of all, for promissory
4 estoppel the agreement doesn't have to be legally binding.
5 It's an alternative count to the breach of contract. But what
6 you have is in this caucus pledge you have this agreement that
7 they will vote with the caucus on all procedural votes. Now,
8 Mr. Gordon already referenced that this was a procedural vote.
9 And my client had been forcibly removed from the caucus for
10 allegedly violating the caucus pledge in the past. So what you
11 have is a promise that the promissor in this case reasonably
12 expected to induce reliance by saying, "Hey, if you sign this
13 censure agreement, you're only going to get censured. We'll
14 worry about the details later." And it actually did produce
15 reasonable reliance because she had been forcibly removed from
16 caucus in the past.

17 *THE COURT:* It still took the House to do it.

18 *MR. OSBURN:* It took two-thirds of the House.

19 *THE COURT:* Two-thirds, right. Under the rules,
20 right.

21 *MR. OSBURN:* And Republicans had a majority at that
22 time. I don't know the exact percentage. But, again, you have
23 this pledge that my client has already seen enforced. And I
24 think that's the difference here. I understand what Your Honor
25 is saying and I don't disagree with you, but in this case my

1 client felt firsthand the wrath of Defendant Cotter in being
2 removed from the caucus. So I think that's what moves this to
3 reasonable in this case.

4 *THE COURT:* When you sit down just take that
5 rationale and apply it to other people that want tax breaks,
6 build a building and they want state help, all of that stuff.

7 *MR. OSBURN:* I don't -- I don't disagree with you,
8 Your Honor. But, again, in this case with that procedural
9 language in there, and it's already been referenced as a
10 procedural vote, my client already having seen the power in
11 this, I think it was reasonable, and that's what we pled.

12 *THE COURT:* Okay. Thank you.

13 *MR. GORDON:* If I may, Your Honor, if I said it was a
14 procedural vote, I was wrong. It's not a procedural vote.
15 It's a substantive vote. To expel somebody from the
16 legislature is certainly a substantive vote. What I was
17 referencing were the nonprocedural votes that we've listed in
18 our response brief which shows that the caucus votes all over
19 the place. They don't go in lockstep. Never have. Never
20 will. They are all individuals. So to think that these
21 people, staffers, can bind the legislature is not reasonable.

22 That goes to the promissory estoppel argument also,
23 Your Honor, that the Michigan Supreme Court, one of the
24 elements to demonstrate the existence of a promissory estoppel
25 claim is reliance on the statement made by the other party.

1 The Supreme Court in Michigan has emphasized that the reliance
2 interest protected by promissory estoppel is reasonable
3 reliance. And that's not here. And if that's not here, then
4 there's no cause of action. Thank you.

5 *THE COURT:* All right. Thank you.

6 Anybody else?

7 *MS. HOWARD:* No, Your Honor. No.

8 *MR. EVANS:* No, Your Honor.

9 *MR. ASHER:* No, Your Honor.

10 *THE COURT:* Okay. Malicious prosecution, abuse of
11 process.

12 Okay. Mr. Osburn, let me hear from you first on
13 that, sir.

14 *MR. OSBURN:* Thank you, Your Honor. The statute at
15 issue in this case, MCL 600.2907, states that there's civil and
16 criminal liability for every person who for vexation, trouble,
17 or with malice, which we've pled, causes another to be
18 arrested, attached, or in any way proceeded against.

19 The thing that distinguishes this case is that
20 everybody involved, from the House of Representatives to the
21 Attorney General, to the State Police, they are all state
22 actors in this case. And, again, we've touched on -- or I've
23 touched on the point that the HBO report really has no
24 credibility and had no credibility with regard to the
25 misconduct of my client. All the House defendants testified to

1 the State Police that they didn't think there was any
2 illegality here and yet they still submitted a resolution to
3 have an investigation done by the Attorney General and by the
4 State Police which caused -- which caused charges to be levied
5 against my client. That's the basis for our malicious
6 prosecution claim.

7 I mean, this isn't just an independent citizen
8 walking into a police station or a prosecutor's office and
9 handing over some evidence. And, again, you can't separate --
10 this goes back to my argument -- you can't separate bucket A
11 from bucket B in this case. The totality of the circumstances
12 in this case certainly indicates that there was malice, that
13 there was -- these were imposed for vexation of my client, and
14 certainly based on an HBO report that was incomplete and not
15 based on any sworn statements.

16 *THE COURT:* Okay. As I understand the law, the
17 defendant in order to -- you know, the plaintiff has to show
18 that the defendant instigated the prosecution as distinguished
19 from just reporting something that may have been illegal,
20 otherwise people would never -- I mean, it would be too big a
21 risk to bring something to the attention of the police.

22 *MR. GORDON:* That's my understanding.

23 *THE COURT:* Am I correct on that?

24 *MR. GORDON:* You are correct, Your Honor.

25 *THE COURT:* Then what does the word "instigating"

1 mean?

2 *MR. GORDON:* Here the prosecution -- I think we have
3 to look at intervening steps. There was the report of the
4 House Business Office that was prepared in the course of
5 legislative responsibility, so we would argue all the
6 immunities apply to that.

7 But secondly, none of these defendants pursued the
8 prosecution. The House resolution to forward the results to
9 the Attorney General was made by two Democrats. They were the
10 sponsors. None of these defendants were.

11 *THE COURT:* Well, you can't sue a representative for
12 voting one way or the other.

13 *MR. GORDON:* That seems to be where we are.

14 *THE COURT:* Unless it's a bribe.

15 *MR. GORDON:* That's the action that is being
16 complained of is the referral of this report to the
17 Attorney General. But once a report was referred to the
18 Attorney General, he enlisted the State Police who conducted
19 their own investigation. And based upon that, the
20 Attorney General, as the prosecutor, and no one else, made the
21 decision to prosecute plaintiff and the other representative.

22 So by preparing the House report didn't instigate the
23 prosecution. There was a House resolution that said the matter
24 should be referred to the Attorney General. Maybe that's what
25 they are talking about. But you certainly can't prosecute the

1 House members for voting and for passing this on. There's no
2 nexus there. The bottom line is that the decision is that of
3 the prosecutor, it's not of the House defendants or any of my
4 defendants here.

5 The quote from our brief, it's a Court of Appeals
6 case from 2015, states "When a citizen places information or a
7 complaint in the hands of the police, even if the information
8 is flawed" -- parenthetically we don't believe ours was -- "and
9 then the police conduct their own investigation and with the
10 prosecutor determine that there was probable cause to pursue
11 the matter, that decision is entirely outside the authority or
12 control of the private citizen." That quote is on all fours
13 with our situation. There was no malice. There was no intent.
14 The legislature was merely following through based upon a
15 resolution request by two Democrats, and they are immune, so
16 there's no case here.

17 *THE COURT:* All right. Thank you.

18 *MR. GORDON:* Shall I address abuse of process?

19 *THE COURT:* Sure. Go ahead.

20 *MR. GORDON:* Well, abuse of process is just wrong.
21 Abuse of process, according to the case law, addresses process
22 that is -- that takes place after a Complaint is filed. There
23 aren't any allegations that even come close to the requirements
24 of establishing the case of abuse of process against any of
25 these people. None of them caused process to be served. There

1 wasn't a Complaint filed that any of them were engaged. Once
2 the criminal Complaint was filed by the Attorney General, that
3 was all the Attorney General, and the House -- none of the
4 other House defendants had anything to do with that. So I'm
5 not even sure what the Complaint is attempting to say with
6 regard to abuse of process, but it certainly doesn't meet the
7 statutory or case law standards. Thank you.

8 *THE COURT:* All right. Thank you.

9 Anybody else want to --

10 *MR. EVANS:* Your Honor, just for the record, in
11 plaintiff's response to Defendant Saari's --

12 *THE COURT:* You can stand up over here.

13 *MR. EVANS:* Plaintiff in her response brief to
14 Defendant Saari's motion, it's page ID 682, she agreed to
15 dismiss her claims for malicious prosecution and abuse of
16 process against Defendant Saari. I'll just make sure that's
17 noted on the record.

18 *THE COURT:* All right. Thank you.

19 *MS. HOWARD:* Your Honor, the same is true with
20 respect to my clients. The plaintiff has agreed to drop that
21 charge with respect to Defendants Allard and Graham.

22 *THE COURT:* All right.

23 *MS. HOWARD:* Thank you, Your Honor.

24 *THE COURT:* Okay. Civil stalking, civil conspiracy.
25 Do you want to go for the defendants first on this one?

1 MR. GORDON: Thank you, Your Honor. Civil stalking
2 is based on an alleged violation of a Michigan statute. There
3 aren't any allegations that any of the House defendants engaged
4 in any stalking whatsoever. There is an allegation that they
5 may have directed the alleged activity. But as with the other
6 complaints, this is akin to conspiracy. There aren't any
7 facts. There aren't any concrete -- there's no concrete
8 evidence whatsoever. It's based upon information and belief.
9 The activities that are complained of, the actual stalking,
10 were not taking place by -- or were not engaged in by any of
11 the House defendants. So the only claim is that maybe, I'm
12 guessing, they directed stalking of the plaintiff. But
13 that's -- that's ridiculous, over the top. And there's no
14 concrete fact. It's speculation, it's conjecture, and that
15 doesn't meet the federal standards of pleading.

16 Similar -- similarly to the civil conspiracy. Again,
17 this is from Fieger versus Cox, a Sixth Circuit case, and I
18 quote, "It is well settled that conspiracy claims must be pled
19 with some degree of specificity and that vague and conclusory
20 allegations unsupported by material facts will not be
21 sufficient to state such a claim. Accordingly, pleading
22 requirements governing civil conspiracy are relatively strict."

23 In Michigan he's required -- the plaintiff is
24 required to prove a concerted action by a combination of two or
25 more people to accomplish an unlawful purpose or a lawful

1 purpose by unlawful means. Here, again, all we have are
2 conclusory statements as to my clients based upon information
3 and belief. There's no concrete evidence. And in order for a
4 civil conspiracy charge to even be made, there have to be valid
5 underlying tort claims. And we believe that none of the tort
6 claims here are valid and they should all be dismissed. If
7 they are all, then it stands to reason, as required by law, no
8 civil conspiracy claim can be maintained. But even if --

9 *THE COURT:* Go ahead.

10 *MR. GORDON:* -- one or more of the tort claims
11 survive, there aren't any concrete allegations. It's just
12 guess and speculation.

13 *THE COURT:* Is stalking defined as a willful course
14 of conduct involving repeated or continuing harassment of
15 another individual that would cause a reasonable person to feel
16 terrorized, frightened, intimidated, threatened, harassed, or
17 molested and that actually causes the victim to feel
18 terrorized, frightened, intimidated, threatened, harassed, or
19 molested? Is that the definition?

20 *MR. GORDON:* I believe so, Your Honor. But there
21 aren't any allegations that any of my clients engaged in that
22 kind of behavior.

23 *THE COURT:* All right.

24 *MR. GORDON:* Thank you.

25 *THE COURT:* Anything?

1 *MR. EVANS:* Two points. There are no allegations in
2 the First Amended Complaint that Mr. Saari had any contact with
3 the plaintiff that she believes was in violation of the
4 Michigan stalking statute, much less two or more of these
5 unconsented contacts that you reference.

6 And the statute itself, unlike the Michigan
7 eavesdropping statute, does not prohibit or address someone
8 directing someone else to quote-unquote stalk them. Those
9 would be two additional reasons.

10 *THE COURT:* All right. Thank you.

11 *MS. HOWARD:* Thank you, Your Honor. With respect to
12 the stalking claim, you are correct, you read the definition of
13 the prohibited conduct or the actionable conduct correctly.

14 So we have a couple of problems with respect to
15 Allard and Graham. First of all, there's no allegation in the
16 Complaint of contact directly with Cindy Gamrat that would fall
17 under the statute. You have to have at least two or more
18 incidents of unconsented contact. But all of the incidents she
19 complains about aren't contact with her, they are contact with
20 her husband, providing information to her husband about her
21 whereabouts.

22 There's a complaint that they forwarded a photo of
23 her vehicle in a public place to her husband. That wouldn't
24 qualify as stalking. And, again, to the extent she complains
25 that my clients were somehow indirectly used by Mr. Gamrat or

1 Mr. Horr in the so-called extortion texts, the State Police
2 concluded there was no evidence to suggest that my clients were
3 involved, and so any reference to the State Police report
4 doesn't really help her cause on that claim.

5 In addition, the extortion texts were all sent to
6 Mr. Courser, so whoever was sending those had contact with
7 Mr. Courser, not Ms. Gamrat. That wouldn't support a stalking
8 claim.

9 There is also -- if you get past all of those things,
10 which you, of course, can't, there's the safe harbor provision
11 that says First Amendment-protected communication or activity
12 would also be excluded from being actionable under the stalking
13 statute, which, of course, we assert strongly that anything my
14 clients said was protected by the First Amendment. So for all
15 of those reasons, Your Honor, there's no stalking claim against
16 Allard and Graham.

17 There's similarly no civil conspiracy claim. Both
18 because -- as other defendants' counsel pointed out -- there's
19 no underlying actionable tort. There's also not sufficient
20 pleading with specificity here that there was a concerted
21 action by two or more persons to either accomplish an unlawful
22 purpose or to accomplish a lawful purpose with unlawful means.

23 For the reasons I talked about earlier, there's no
24 specific allegations that suggest that these defendants were
25 working together. In fact, all of the evidence to which the

1 Complaint points the reader, like my client's Complaint,
2 suggests to the contrary, that they were not working together.
3 So there's simply nothing here to support civil conspiracy
4 against Allard and Graham either, Your Honor.

5 *THE COURT:* All right. Thank you.

6 *MS. HOWARD:* Thank you, Your Honor.

7 *THE COURT:* Mr. Osburn.

8 *MR. OSBURN:* I know we discussed this -- sorry,
9 Your Honor -- I know we discussed this earlier, but again I
10 would just point to the nexus that we have established in our
11 Complaint between House defendants and staff defendants, staff
12 defendants and the extortionists, and everybody referencing
13 that they work for the speaker, all while my client is being
14 harassed. As early as February of 2015 she's being harassed.
15 She knows that her information is being divulged to somebody.
16 She's receiving --

17 *THE COURT:* How is she being harassed? I mean, the
18 standard is pretty high. Terrorized?

19 *MR. OSBURN:* Sure.

20 *THE COURT:* How was she terrorized?

21 *MR. OSBURN:* Her location was being divulged. She
22 knew there were recordings, secret recordings of her being
23 taken at that time.

24 *THE COURT:* All right.

25 *MR. OSBURN:* My client was receiving extortion texts,

1 so I'm not sure what counsel was referring to that they only
2 went to Mr. Courser. They went to my client as well about
3 divulging this information. And this is all during the period
4 of time where defendants are in communication with the
5 extortionists. So, again, we would point to the nexus between
6 the defendants, which we've pled extensively.

7 Now, as far as the safe harbor provision goes, the
8 case that -- excuse me, Your Honor -- the case that Ms. Howard
9 stated or relied upon is the Nastal versus Henderson &
10 Associates Investigations. That case explicitly referred to
11 the Private Detective License Act in Michigan and explicitly
12 referred to the fact that the individual in that case who was
13 doing the surveillance was a licensed private investigator, was
14 doing it pursuant to litigation. That is simply not the case
15 here, and we would argue that that exception does not apply.

16 And not only that, Defendants Allard and Graham were
17 following my client across the state to take pictures and send
18 them to her ex-husband on state time. And that's -- that's in
19 the Complaint and in the attachments as well. They would have
20 had to leave on state time to send these pictures of my client.

21 *THE COURT:* Okay. Thank you.

22 *MR. OSBURN:* Thank you.

23 *THE COURT:* Defamation is gone.

24 Fraud. You're talking about Evans' statements. And
25 that's a question of, once again, reliance.

1 Have we handled that one from your perspective,
2 Mr. Osburn?

3 *MR. OSBURN:* With regard to the fraud claim,
4 Your Honor.

5 *THE COURT:* Yes.

6 *MR. OSBURN:* I believe we have.

7 *THE COURT:* Okay. The indemnification, have we
8 handled that one?

9 *MR. OSBURN:* I don't believe we've touched on the
10 indemnification. If I may, Your Honor.

11 *THE COURT:* Go ahead.

12 *MR. OSBURN:* It's just important to understand what
13 we're claiming in the indemnification claim. And that is we're
14 looking for an order enjoining defendants from refusing to
15 indemnify my client for an unconstitutional reason. Now, we've
16 pled a violation of her due process rights. We acknowledge
17 that the indemnification statute is discretionary. We can't
18 dispute that. But we also allege that the reasons that they
19 have refused to indemnify her implicate the due process clause.
20 So that's why we're seeking an order enjoining them --
21 enjoining the House specifically from refusing to indemnify my
22 client for an unconstitutional reason. That's why this falls
23 outside of any of the immunities as well. We're not seeking
24 money damages, but we are seeking that order here.

25 *THE COURT:* Okay. Thank you, sir.

1 *MR. GORDON:* Just simply on indemnification. It
2 states it may occur. The Supreme Court in Michigan has ruled
3 may means may. It's discretionary. The relief they are
4 seeking is apparently to have you order an appropriation from
5 the legislature. I think that's inappropriate here. And where
6 the statute is discretionary, it's discretionary. And I don't
7 know any other arguments to make with regard to that.

8 There's one immunity argument that we did not discuss
9 that I just would like to mention.

10 *THE COURT:* Why don't you go for it, and then I'll
11 give Mr. Osburn a chance to come back. Go for it right now.

12 *MR. GORDON:* Is the governmental immunity statute --

13 *THE COURT:* Okay.

14 *MR. GORDON:* -- which precludes tort damages against
15 the legislature for public officials acting in their official
16 capacity. And we've briefed that extensively.

17 *THE COURT:* That comes up every once in a while.
18 What do you do with a lot of federal acts that say that state,
19 you know, actors may be liable? But anyway.

20 *MR. GORDON:* Where the state actors may be liable for
21 an underlying tort?

22 *THE COURT:* Violating someone's constitutional
23 rights.

24 *MR. GORDON:* Right.

25 *THE COURT:* Yeah.

1 MR. GORDON: And I don't think that's been
2 established here or even properly plead.

3 THE COURT: All right. I think we talked about it
4 earlier anyway.

5 MR. GORDON: Pardon me, Your Honor?

6 THE COURT: I say I think we talked about it earlier
7 anyway.

8 MR. GORDON: Yes, we did. Thank you, Your Honor.

9 THE COURT: Anything further?

10 MR. OSBURN: I have nothing further, Your Honor.

11 THE COURT: Anything further on anything, Mr. Osburn?

12 MR. OSBURN: No, Your Honor.

13 THE COURT: Anybody want to talk?

14 MR. GORDON: Nothing from the state defendants,
15 Your Honor.

16 MR. EVANS: Nothing, Your Honor, on behalf of
17 Defendant Saari.

18 MS. HOWARD: Nothing else, Your Honor.

19 THE COURT: All right. I'll take it under
20 advisement. I was hoping to be able to do something today.
21 I've got other things to think about, and I don't have a
22 secretary, so it's going to take me -- we won't be able to get
23 something out this week, but it will certainly be next week.
24 Okay.

25 MR. GORDON: Thank you, Your Honor.

1 **THE COURT:** I want to thank everybody for the fine
2 presentations that you had here and your ability to work very
3 professionally together. We're adjourned. Thank you.

4 **MR. OSBURN:** Thank you, Your Honor.

5 **THE COURT:** But keep in mind index going forward.

6 **MR. OSBURN:** Yes, I will do that, Your Honor.

7 **THE COURT:** All right. You're free to go.

8 **THE CLERK:** Court is adjourned.

9 *(Proceeding concluded at 3:28 p.m.)*

10 * * * * *

11 I certify that the foregoing is a correct transcript
12 from the record of proceedings in the above-entitled matter.

13 I further certify that the transcript fees and format
14 comply with those prescribed by the court and the Judicial
15 Conference of the United States.

16
17 Date: June 21, 2018

18
19 **/s/ Glenda Trexler**

20 _____
Glenda Trexler, CSR-1436, RPR, CRR

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